NO. 48936-8-II

In the Court of Appeals of the State of Washington
Division 2

CITY OF TUMWATER, Respondent

v.

ALAN LICHTI, Petitioner

PETITIONER'S REPLY BRIEF

Christopher Taylor
Attorney for Appellant
CR Taylor Law, P.S.
203 4th Ave E Ste 407
Olympia, WA 98501
Voice: (360) 352-8004
Fax: (360) 570-1006
Email: taylor@crtaylorlaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

A) ASSIGNMENT OF ERROR

Trial court gave an erroneous definition of "exert unauthorized control" in the jury instructions by omitting the "nature of custodian" element, thereby relieving the City of Tumwater of proving all necessary elements of the crime of Theft in the Third Degree, and that error was not harmless.

B) ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Is "uncontroverted evidence" the proper standard for reviewing for the harmlessness of an error consisting of omitted or misstated elements in the jury instructions?

2. Has the City met its burden of establishing the harmlessness of the instructional error beyond a reasonable doubt?

C) ARGUMENT

1. "Uncontroverted evidence" is the proper standard for reviewing the harmlessness of an error consisting of omitted or misstated elements in the jury instructions.

Historically, "an instruction that relieves the [government] of its burden to prove an element of a crime [was] automatic reversible error." *State v. Jennings*, 111 Wn. App. 54, 62 (2002). However, eighteen years ago "[t]he United States Supreme Court held that a jury instruction that relieves the prosecution of its burden to prove an element of a crime is

subject to a harmless error analysis." *Id.* (citing *Neder v. United States*, 527 U.S. 1 (1999). Because such an error sounds in the "federal constitution," Washington State courts "must follow" the United States Supreme Court's analysis. *Id.* at 63-64.

The "*Neder* court" noted under a longstanding Federal rule, a "constitutional error is harmless" only when "it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *State v. Brown*, 147 Wn.2d 330, 341 (2002) (citing *Neder*, 527 U.S. at 15 (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). "When applied to an element omitted from, or misstated in, a jury instruction, the error is harmless if that element is supported by uncontroverted evidence." *Id.* (citing *Neder*, 527 U.S. at 18). That is, for *any* constitutional error, the test is whether the government has proved "beyond a reasonable doubt that the jury verdict would have been the same absent the error." *Id.* (quoting *Neder*, 527 U.S. at 19). But for constitutional instructional error that consists of relieving the government of proving each element of the crime charged in particular, the government can only meet that burden of establishing harmlessness beyond a reasonable doubt by establishing the evidence "was uncontested and supported by overwhelming evidence." *Neder*, 527 U.S. at 17.

The "uncontroverted evidence" standard does not apply to other types of constitutional error. For example, where the constitutional error consists of adding an "unwanted affirmative defense," courts look at, for example, whether instructing on an unwanted defense "impacted jury deliberations by interfering with" the defendant's presentation of another defense by "risk[ing] confusion" between defined terms, and whether the defendant had the opportunity to present evidence as to the unwanted defense. *State v. Corstine*, 177 Wn.2d 370, 381 (2013); *see also State v. Jones*, 99 Wn.2d 735, 748 (1983) (harmful error where "the jury was faced with two defense attorneys arguing conflicting defense theories" and where "much of the...evidence introduced at trial would have been inadmissible if [the unwanted] defense [had not been] raised"). Where constitutional error consists of admitting evidence in violation of the Confrontation Clause, courts have considered whether "the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt." *State v. Guloy*, 104 Wn.2d 412, 426 (1985); *see also State v. Lane*, 125 Wn.2d 825, 839-41 (1995) (applying "overwhelming untainted evidence" test to error consisting of improper judicial comments on the evidence); *see also State v. Thompson*, 151 Wn.2d 793, 808 (2004) (applying "overwhelming untainted evidence" test to error consisting of admission of evidence seized in violation of the Fourth Amendment).

But Washington courts *have* consistently applied an "uncontroverted evidence" test for constitutional error consisting of misstated or omitted elements since *Neder* was explicitly adopted by Washington courts in 2002. *See State v. Zimmerman*, 130 Wn. App. 170, 180 (2005) (the "instructional error was clearly harmless" because "J.C.'s date of birth was undisputed"); *see also State v. Grimes*, 165 Wn. App. 172, 191 (2011) (where there was "no[] attempt[] to challenge the uncontroverted evidence that the sale occurred less than 1,000 feet from a school bus route stop...the procedure by which unanimity was achieved could not have affected the jury's special verdict on the sentence enhancement," even if that procedure was constitutional instructional error); *see also State v. Weaville*, 162 Wn. App. 801, 815 (2011) ("[C]onflicting evidence was presented regarding whether Weaville's penis had penetrated A.S.'s vagina.... [therefore] the erroneous jury instruction was [not] harmless as to Weaville's conviction of rape in the second degree"); *see also State v. Jones*, 117 Wn. App. 221, 231 (2003) (where "damning and uncontroverted evidence of [the omitted element of] knowledge" was presented at trial, court "conclude[d] beyond a reasonable doubt that the erroneous omission of the element of knowledge from the to-convict jury instruction had no effect on the verdict"); *see also Jennings*, 111 Wn. App. at 64-66; *see also Brown*, 147 Wn.2d at 341-43.

Even *Linehan*, which does not explicitly mention the "uncontroverted evidence" standard, is consistent with application of that standard. 147 Wn.2d 638 (2002). The *Linehan* court noted the evidence established "Linehan withdrew $105,000 from his Washington Mutual account" which had an "improper $116,999 balance," "and deposited the sum...in his personal savings account at Continental Savings Bank," then "made 22 withdrawals from his Continental account." *Id.* at 642. Moreover, "[a]t trial, Linehan testified that his lawyer advised him that he could not keep the money" and that "Linehan was also aware that the money did not rightfully belong in his Washington Mutual account." *Id.* at 654. Finally, "Linehan refused to" provide a "promissory note for the outstanding sum...secure[d]...with collateral" at the request of Washington Mutual. *Id.* at 642. The *Linehan* court essentially found there was uncontroverted evidence as to what Mr. Linehan actually did, to wit: "took the property or services of another." *Id.* at 654. There is nothing in the *Linehan* opinion's references to "ample" and "sufficient" evidence that would suggest a new standard for harmless error review was being established; to the contrary, the court there reiterated "constitutional error [is] harmless only if [it was] convinced beyond a reasonable doubt any reasonable jury would reach the same result absent the error." *See id.* at 641, 654.

Here, the City concedes the "special relationship language should have been included in the definition" of "exerting unauthorized control." Brief of Resp. at 4. By doing so, the City also necessarily concedes the jury instructions given by the trial court did relieve the City of the burden of proving an essential element of the crime charged. *See Linehan*, 147 Wn.2d at 653. Moreover, the City does not appear to assert that the evidence was uncontroverted; rather, the City argues Mr. "Lichti's own version of events" was "highly improbable" and "not...credible." Brief of Resp. at 7, 9, 11.

Needless to say, this Court must "defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v. Thomas*, 150 Wn.2d 821, 874-75 (2004) (overruled on other grounds by *Crawford v. Wash.*, 541 U.S. 36 (2004)). The jury was entitled to believe or disbelieve any of the witnesses' testimony—including the testimony of both Mr. Lichti and Officer Finch —in whole or in part. The City's argument that Mr. Lichti's testimony was not credible should be ignored insofar as it attempts to encourage this Court to invade the province of the jury.

Because the evidence was controverted, the trial court's giving of the erroneous instruction defining "exert unauthorized control" was

harmful error. Therefore, this Court should reverse Mr. Lichti's conviction and remand for a new trial.

2. Under the "contribution test," the City has not met its burden of establishing the harmlessness of the instructional error beyond a reasonable doubt.

The City seems to propose this Court apply the more generalized "contribution test," rather than the more particularized "uncontroverted evidence" test. *See* Brief of Resp. at 7. As argued in Section 1 above, this would be improper, not because it is the wrong standard, but because a more precise and workable manner of applying of applying that standard in *Neder*. But even if the Court would to accept the City's invitation to revert to the more generalized "contribution test," the City still has not met its burden of establishing harmlessness beyond a reasonable doubt.

"[C]onstitutional error is harmless only if it can be said beyond a reasonable doubt that it did not contribute to the verdict." *State v. Robinson*, 38 Wn. App. 871, 876 (1984). "Application of the contribution test contemplates focusing on the constitutional error, asking whether it might have contributed to a guilty verdict." *Id.* The test is difficult to apply, especially "in an instructional error case" because "it is not possible to isolate the error with clinical precision since it involves the possible contamination of the jurors' perspective" and because appellate

courts "cannot invade the province of the jury by becoming triers of fact or in speculating what they might do." *Id.* at 877.

Here, the jury returned a guilty verdict. CP 189. To do so, under the instructions it was given, the jury would have found "[t]hat on or about May 29, 2012, [Mr. Lichti] wrongfully obtained or exerted unauthorized control over property of another not exceeding $750 in value;" that Mr. Lichti "intended to deprive the other of the property;" and that Mr. Lichit's "act occurred in the State of Washington, City of Tumwater." CP 180. To have convicted under the "exert unauthorized control" definition actually provided, the jury would have had to conclude Mr. Lichti had "any property in [his] possession, custody, or control" and that he "control[led], secrete[d], withh[e]ld, or appropriate[d]" that property "to his own use or to the use of any person other than the true owner or person entitled thereto." CP 181. To have convicted under the "wrongfully obtains" definition, the jury would have had to conclude Mr. Lichti "t[ook] wrongfully the property or services of another." CP 182.

Under the instructions given, the jury could have believed all of Mr. Lichti's testimony and nevertheless convicted under the "exert unauthorized control" definition. Specifically, the jury could have found believed Mr. Lichti's testimony that he went "to Walmart...to buy a laptop, and indeed "did...buy...[a]n Acer" laptop" before he "went home" and

placed "the computer in [his] bedroom" with the intention of "us[ing]" the laptop to "[s]earch the net" and watch "YouTube" videos." CP 101, 116. In other words, Mr. Lichti testified he had "property"—to wit, the laptop—in his "possession, custody or control," and that he "appropriate[d]" the laptop "to his own use." Although the jurors may have found the idea that this purchase constituted "unauthorized" control absurd, the jurors were also instructed it was its "duty to accept the law from [the trial court's] instructions, regardless of what [they] personally believe[d] the law is or what [they] personally th[ought] it should be." CP 172.

Clearly, the jury could have also believed that the laptop was the "property of another"—to wit: Walmart—prior to Mr. Lichti completing the purchase, and that Mr. Lichti "intended to deprive" Walmart of the laptop by purchasing it. Essentially, the "exert unauthorized control" definition is so nefarious precisely because it ordinary retail transactions into thefts.

On the other hand, under the instructions given, the jury could have *disbelieved* much of Mr. Lichti's testimony and nevertheless acquitted under the "wrongfully obtains" definition.

The jury heard evidence independent of Mr. Lichti's testimony that Mr. Lichti had purchased the laptop for cash from Walmart. CP 57-58, 60. Indeed, Walmart's "asset protection associate" Amanda Johnson testified

"[t]here was nothing out of the ordinary with that purchase" and "[i]t didn't seem necessary to track somebody who was just...buying stuff." CP 60. The jury certainly could have concluded concluded from the evidence that Mr. Lichti's "tak[ing]" of the laptop on this occasion was not "wrongful."

Furthermore, the jury heard evidence independent of Mr. Lichti's testimony that Mr. Lichti did not return to the Walmart that day. CP 60-61. From this, the jury could have concluded Mr. Lichti did not "take...the property or services of another," rightfully or wrongfully, at any other point "on or about "May 29, 2012" "in the State of Washington, City of Tumwater," and therefore found Mr. Lichti not guilty under the "wrongfully obtains" prong. Even supposing the jury inferred or speculated that Mr. Lichti did "take" money from the man in the yellow shirt that belonged to Walmart, the jury was presented with no evidence from which it could have concluded this "taking" occurred on or about May 29, 2012, or that it occurred within the City of Tumwater.

Indeed, the jury could have concluded no "taking" occurred *and* also believed Mr. Lichti solicited, commanded, encouraged, or requested the man in the yellow shirt return the empty laptop box to Walmart for a cash refund. Here, the City did not elect to pursue an accomplice liability theory against Mr. Lichti. *See State v. Ransom*, 56 Wn. App. 712, 714

(1990) ("Accomplice liability is a distinct theory of criminal culpability. If the [government] elects to pursue that theory, it has an obligation to offer timely and appropriate instructions. A defendant has the right to rely on the fact that the State has elected not to pursue that theory"). Thus, the jury was not instructed on accomplice liability, and so the jury's verdict could not have been based upon that theory.

Because the jury could have convicted under the "exert unauthorized control" prong, and acquitted under the "wrongfully obtains" prong," the fact that the "exert unauthorized control" definition was erroneous may have contributed to the jury's verdict. Therefore, the City has failed to establish harmlessness beyond a reasonable doubt, and this Court must reverse the conviction and remand for a new trial.

D) CONCLUSION

The trial court gave an erroneous as a matter of law definitional instruction of "exert unauthorized control" in Mr. Lichti's Theft in the Third Degree trial. That error was of constitutional magnitude. Under either the "uncontroverted evidence" standard or the "contribution test," the City has failed to establish harmlessness beyond a reasonable doubt.

///

///

///

Therefore, this Court should reverse the conviction, and remand for a new trial.

DATED this 10th day of February, 2017.

/s/ Christopher Taylor
Christopher Taylor
Washington State Bar Association # 38413
CR Taylor Law, P.S.
Attorney for Appellant
203 4th Ave E Ste 407
Olympia, WA 98501
Telephone: (360) 352-8004
Fax: (360) 570-1006
E-mail: taylor@crtaylorlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2017, I mailed, postage prepaid, true copies of the foregoing PETITIONER'S BRIEF to counsels for the Respondent, CAROL LAVERNE and MICHAEL TOPPING at the Thurston County Prosecuting Attorney's Office, 2000 Lakeridge Dr SW, Olympia, WA 98502, and to the petitioner, ALAN LICHTI, at 3425 Shincke Rd NE Apt B, Olympia, WA 98506.

/s/ Christopher Taylor
Christopher Taylor

CR TAYLOR LAW, P.S.

February 10, 2017 - 3:24 PM

Transmittal Letter

Document Uploaded: 4-489368-Reply Brief.pdf

Case Name: City of Tumwater v. Lichti

Court of Appeals Case Number: 48936-8

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Reply__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Christopher Taylor - Email: taylor@crtaylorlaw.com

A copy of this document has been emailed to the following addresses:

Topping.MichaelD@gmail.com
Lavernc@co.thurston.wa.us